IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4070 OF 2004

Mahendra Kantilal Shah,)
Indian Inhabitant of Mumbai,)
residing at Room No.13,)
Ground Floor, Ruby Terrace,)
M.V.Road, Andheri (East),)
Mumbai - 400 069.).. Petitioner

Versus

M/s.Ruby Builders,)
Partnership Firm,)
registered under Indian)
Partnership Act, having office)
at 504/505/Vithaldas Chambers,)
16, Bombay Samachar Marg,)
Fort, Mumbai - 400 001.).. Respondent

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Shri Omprakash Pandey i/b M/s.Pandey & Co. for the petitioner.

Shri Singade i/b N.N.Vaishnava for repondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 7th SEPTEMBER, 2004.

ORAL JUDGMENT :

1. Heard. Perused the records. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner challenges the orders passed by the Courts below, namely, the order of the trial Court dated 12th January, 2004 rejecting the application filed by the petitioner seeking leave to file written statement beyond the period of 90 days, which is outer

limit fixed under the provisions of Order VIII Rule 1 of the Code of Civil Procedure, and the order dated 26th March, 2004 passed by the Appellate Bench of the Small Causes Court in Revision Application No.15 of 2004.

3. The short point which is raised for consideration is that whether both the Courts below have failed to consider as to whether the petitioner had made out sufficient cause for condoning delay in filing the written statement or not, and have mechanically applied the provisions of law contained in Order VIII Rule 1 of the Code of Civil Procedure for rejecting the application filed by the petitioner for condonation of delay in filing the written statement. In that connection, reliance is placed in the unreported decision of a Division Bench of this Court in the matter of **Chintaman Sukhdeo Kaklij & Ors. v. Shivaji Bhausaheb Gadhe & Ors.** in Writ Petition No.2847 of 2004 and various other writ petitions delivered on 12th and 13th August, 2004.

4. Undoubtedly, the decision of the Division Bench in relation to the powers of the Court to condone the delay in filing the written statement reads thus :-

> "Rules 9 and 10 of Order 8 of CPC give discretion to the trial Court to allow the

> defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8 Rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8 Rule 1 always to be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional, and special circumstances."

5. There is no doubt that the said order of the Division Bench was delivered much after the impugned orders were passed. Nevertheless, the decision of the Division Bench declares the law as is in force since the amended provisions to Code of Civil Procedure have come into force and those provisions existed even at the time when the impugned orders were passed. Being so, the Courts below are bound by the said order of the Division Bench and to follow and apply the same in appropriate cases. Considering the said decision of the Division Bench therefore the impugned orders, which do not disclose the discretion having been exercised judiciously and in terms of the provisions of law, the decision cannot be sustained and while setting aside both the impugned orders, the matter

needs to be remanded to the trial Court for reconsideration of the application of the petitioner seeking leave to file written statement beyond the period prescribed under the law. Undoubtedly, the Courts below shall bear in mind the law laid down by the Division Bench and the observations made in the decision in **Chintaman's case (supra),** while considering the application of the petitioner seeking leave to file written statement beyond the period of 90 days.

6. The petition, therefore, succeeds on the limited ground, as stated above. The impugned orders are hereby quashed and set aside and the matter is remanded to the trial Court for reconsideration of the application of the petitioner seeking leave to file written statement beyond the period of 90 days, as prescribed under the law. Rule is made absolute accordingly with no order as to costs.